In the case of *Verrell*, it was admitted there were no debts owing, and it was not suggested that there was any other reason for selling. Kekewich J., at p. 69 stated "I do not feel myself bound to hold that even an executrix can, in a peculiar case like this, make a sufficient title. I must not say that where there are no debts the possibility of selling for other purposes cannot be regarded as sufficient; it is enough for me to say that I do not think I ought to force a title on a purchaser where there is no definite law on the point." In the present case, the mortgagee knew the purpose for which the mortgage was given, viz. as security for the mortgagor's personal debt to him.

In these circumstances, I consider that the purchaser has shown good grounds why the title, which is obviously defective, should not be forced upon him. This appears to me an issue properly raised in a summons under s. 4 of the Conveyancing and Law of Property Ordinance (Cap. 118) as an "objection," even though the purchaser did not make further requisitions as to the title. The object of that section is to dispose of all questions arising out of a contract of sale, in a summary and economical manner.

I therefore hold that the purchaser's objection is well founded and has not been answered; and that he ought to be discharged from his purchase; and that good title to the land has not been shown, and it is ordered that the defendant do repay to the plaintiff the sum of $300 paid as deposit.

At the request of counsel the question of the costs of this summons is reserved for further argument.

Order Accordingly.

Solicitors for the plaintiff:—*Barrett & Co.*

Solicitor for the defendant:—*S. Fung.*

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J., THOMAS. C.J. (F.M.S.) & HOWES, J.

June 26, 1937.

IN RE BROOKE DAVID DECEASED. M. SAYERS AND ANOTHER v. D. B. DAVID AND FOUR OTHERS.

[SINGAPORE ORIGINATING SUMMONS No. 77 of 1936]

Infant litigant—Leave to appeal in forma pauperis—Next friend out of jurisdiction—application for extension of time for appeal—Civil Procedure Rules, 0.16 r.27.

An infant's interests under a will were prejudicially affected by a judgment on the construction of such will. The infant by her next friend applied to the High Court for leave to appeal *in forma pauperis* to the Court of Appeal. The papers were sent to counsel for report and the application came before the Judge and was allowed. The applicant subsequently applied to the Court of Appeal for an extension of time for appealing.

Held, that the Court has jurisdiction to allow such an application even though the next friend is out of the jurisdiction. There is no rule in the Colony that upon such an application there must be an affidavit of merits for the consideration of the Court of Appeal and in fact in this case the merits had already been considered by the High Court upon the application for leave to appeal as a pauper.

MOTION to the Court of Appeal for extension of time.

Cobbett for plaintiffs the trustees.

Haydon for D. B. David.

Battishill for M. David, the applicant.

Dr. Withers-Payne for the 3rd, 4th and 5th respondents.

The facts and arguments appear sufficiently from the Judgment.

Cur. Ad. Vult.

TERRELL, AG. C.J.—This is an application by Margaret David, an infant by her next friend Juliana van Waardenburg to extend the time for appealing against the judgment of de Buriatte J. dated the 19th March 1937, notwithstanding that the application is out of time.

In order to get leave the applicant must show merits and must also explain the reasons for delay. As regards the latter, although the Court is strict where the delay has been due to neglect on the part of the solicitors, in this case, the fact that the applicant was in Java, and it was accordingly difficult to obtain instructions, the fact that the time limited for appealing has under the recent amendment to the Rules been reduced to three weeks, and the fact that the applicant is an infant, are matters to be considered, and in my opinion the affidavit in support sufficiently explains the delay that has occurred.

With regard to merits, the application for leave to appeal as a pauper was made by the infant and her next friend by petition dated the 14th April 1937. The Registrar having satisfied himself as to the petitioner's means, the papers were sent to counsel for report, and the matter came before a Judge. The application was heard before Horne J., and he decided to allow the applicant and her next friend to appeal *in forma pauperis*. The question of merits has accordingly been before the Court, and it is not for this Court to retry the issue as to whether there is a *prima facie* case or not. The applicant therefore has complied with the rule which requires her to show merits before she can be granted extension of time.

The present application was opposed by certain of the beneficiaries on various technical grounds and their objections were supported by counsel for the trustees.

The first objection was that the applicant appeared in the Court below by a guardian *ad litem*, that it was for such guardian *ad litem* to make the present application; and that it could not be made by a different person as next friend until the guardian *ad litem* had been removed by Order of Court.

Speaking for myself, I am inclined to think that the guardian *ad litem* was *functus officio* when the proceedings below were completed. Whether that is or is not so, the learned Judge who gave leave for Juliana to appeal as next friend of the infant was fully aware that the infant had appeared by a guardian *ad litem* in the Court below. Accordingly the position of the guardian *ad litem* was before the Court, and the infant was notwithstanding permitted to appeal by a different person as next friend in lieu of the former guardian *ad litem*. There is accordingly no substance in this objection.

There was another objection that the next friend should have been described either as a spinster or *feme-sole* since the general rule is, that a married woman cannot be a next friend (See *Daniell's* Chancery Forms p. 34 note (b)), but that point has been met by Mr. Battishill being permitted to amend his application so as to describe Juliana as a *feme-sole*.

The next objection was that the next friend must be within the jurisdiction.

No doubt the general rule is that a next friend must be within the jurisdiction. There is particular reason for this rule, where the next friend is liable for costs, and where the Court requires to exercise control over the next friend in connection with proceedings pending before the Court. The only authority for the proposition appears to be *Anon*, 18 Jur. 770. This was the case not of a next friend but of a guardian *ad litem*, and Page Wood V. C. puts it no higher than this—"It is as well to have for a guardian some person within the power of the Court to reach." These considerations hardly apply where the next friend has himself been admitted to represent the infant as a pauper, and where the only issue before the Court is the construction of a will, and there is nothing that the next friend may be required to do.

As stated by Lord Cranworth in *Lindsay* v. *Tyrrell*, 44 E.R. at p. 890:—"Though a next friend is in general liable to costs, 'next friend' does not mean a person to answer costs, but a person who undertakes to conduct the suit on behalf of the infant."

The same case is an authority for the proposition that where an infant cannot obtain anyone except a pauper as a next friend, the Court may allow the next friend to sue as a pauper, as otherwise the infant might be prevented from asserting her rights at all. In any case this was the order made by Horne J. when he allowed the application of the infant and her next friend to appeal *in forma pauperis*. It is true that the general order made upon the petition does not appear to carry out correctly the intention of the learned Judge, but there is always inherent jurisdiction in the Court to vary its own orders so as to give effect to its own meaning. (See *per* Lord Watson in *Hatton* v. *Harris*, (1892) A.C. 560). The Court therefore called upon Mr. Battishill to give an undertaking to apply to amend the order made upon the application before Horne J. and such undertaking should be embodied in the order made upon this application.

My conclusion therefore on the subject of this objection is that the Court has ample jurisdiction to allow the application of a next friend who is out of the jurisdiction in a case such as the present, and that in any case an order to that effect has in fact been made, and no appeal having been lodged, the point cannot be raised by way of objection in the same proceedings.

The final objection raised by the respondents was that upon the true construction of 0.16 r.27 there should have been an affidavit of merits.

Order 16 r.27 reads as follows:—

> "The preceding rules relating to paupers shall apply to persons who, not having sued or defended as paupers in a Court of first instance, desire to appeal as paupers to the Court of Appeal, and to paupers who are respondents to any appeal; but no person who has been admitted to sue or defend as a pauper in any proceedings shall be admitted to appeal as a pauper to the Court of Appeal without the leave of a Judge or of the Court of Appeal; and in case of his being so admitted, he shall not be required to give security for the costs of the appeal."

It was argued by Dr. Withers Payne that the second part of the rule beginning with the words "but no person etc." should also be applied to a person who did not defend as a pauper in the Court of first instance, but desires to appeal as a pauper; and that the practice under the corresponding English rules (0.16 rr. 31E and 31F) is different and should be followed in the constructions of the local rule. After careful examination of the local and English rules, I cannot find that there is in substance any difference between them, and if there were, the local rule must be construed according to its natural meaning. It provides that where a party has not been a pauper below, he can be admitted to appeal as a pauper, subject to the same conditions as would apply if he were suing or defending as a pauper. Where, however, he has already sued or defended as a pauper, he is not allowed to carry the matter further without his chances of success in the

appeal being considered either by a judge or the Court of Appeal.

The rule does not provide for the Court of Appeal considering the merits of the application of a party who was not a pauper in the Court below and as I have pointed out above the merits were in fact considered by Horne J. upon the application before him. The rules have accordingly been complied with, and there is no substance in this objection.

This disposes of all the preliminary objections. In my opinion the application should be granted and the applicant should have six weeks from the date of the order made herein to file her notice of appeal. The respondents should have their costs to be taxed as between solicitor and client and paid out of the estate. There will be no order as to the applicant's costs.

THOMAS C.J. (F.M.S.)—I concur.

HOWES J.—I concur.

Application Allowed.

Solicitors for trustees—*Rodyk & Davidson.*

Solicitor for applicant—*P. Battishill.*

Solicitors for 1st respondent—*Donaldson & Burkinshaw.*

Solicitors for 3rd, 4th and 5th respondents—*Drew & Napier.*

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J.

July 27, 1937.

BRITISH MALAYA TRUSTEE AND EXECUTOR COMPANY, LIMITED AND ANOTHER

vs.

CHAN MEK TUAN AND TWO OTHERS.

[SINGAPORE ORIGINATING SUMMONS No. 56 of 1937]

Will — Construction — "Child" — Whether adopted sons included — Duties of Counsel who appear for a representative of a class.

An illustration of a testator making his own dictionary. The expression "child" may be interpreted to include "adopted sons" if it appears from the will that the testator has used the expression in that sense.

When counsel appears on behalf of a person appointed to represent a class of persons it is his duty to protect the interests of that class. If the representative himself gives his counsel instructions which are inconsistent with that duty, counsel should either refuse to accept such instructions and should protect the interests of the class or else he should retire from the case.

ADJOURNED ORIGINATING SUMMONS.

Page for plaintiffs, the trustees.

Cobbett for first defendant.

Zehnder for second defendant.

Green for third defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

TERRELL, AG.C.J.—Three questions arise upon this Originating Summons:

(1) Whether the expression "child" in clause 2 of the Will means a natural child or includes an adopted child

(2) Whether under clause 6(3) of the Will the gift to Lim Chye Inn of 20 out of 95 shares of the income of the residuary Trust Funds vested in the said Lim Chye Inn absolutely or was subject to defeasance upon her death after the Testator, but before the date of distribution

and (3) Whether a sum of $19,162.96 in the hands of the Plaintiffs as receivers be treated as capital or income.

As regards the first question, this presents little difficulty. The testator had only one natural child, his daughter Lim Chye Inn. His three sons were all adopted. As however he speaks of his adopted sons as 'sons' throughout the Will, and as the expression 'last surviving child' in clause 2 necessarily implies that the testator considered he had more than one child, I think it follows that the expression 'child' includes his adopted sons.

As regards the third question, there is no evidence as to the origin of the $19,162.96, which the receivers found in the Bank after their appointment. There have clearly been large defalcations of capital, and, on the authority of *In re Grabowski's Settlement*, L.R. 6 Eq. p.12, the sum in question must be treated as capital. If any of the legatees have any claim for arrears of income such claim must be preferred against the defaulting trustees; *Solley* v. *Wood*, 54 English Reports, p.714.

The chief difficulty arises upon the construction of clause 6 of the Will. Clause 6 contains a bequest of all the residue to the Trustees, upon trust for sale, conversion and investment, and for payment of debts, funeral and testamentary expenses and upon trust:—

> "To stand possessed of the moneys and investments for the time being representing my residuary estate which moneys and investments are herein called "my residuary trust funds" until the date of distribution IN TRUST in the meantime to pay out of the income thereof the said monthly sums of Dollars eight hundred